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No. 01-394

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

WARREN CHRISTOPHER, MARILYN MCAFEE, ALEXANDER WATSON, ANNE PATTERSON, PEG WILLINGHAM, ANTHONY LAKE, and RICHARD E. FEINBERG,

Petitioners,

v.

JENNIFER K. HARBURY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

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REPLY BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Whether allegations that senior State Department and National Security Council officials withheld information and intentionally misled a private citizen about a foreign rebel leader in the captivity of a foreign government state a violation of the constitutional right of access to the courts, when the only claim is that defendants' speech was intentionally misleading and there are no allegations that the plaintiff ever tried to file a lawsuit and was actually hindered in that effort?

2. If the Court concludes that a constitutional violation is properly grounded on allegations such as these, whether government officials violate clearly established law whenever they allegedly mislead a private citizen or conceal information and it is later claimed that they intended to and did hinder the filing of a hypothetical lawsuit?

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REPLY TO BRIEF IN OPPOSITION

Both issues presented merit review. *First*, the substantive due process claim for denial of access to the courts cannot be squared with the Court's precedents, supplants ordinary judicial procedures, and creates serious practical impediments to American foreign policy and intelligence efforts. *Second*, the qualified immunity analysis below clearly contravenes the Court's repeated directions and justifies summary reversal.[1]

I. THE SUBSTANTIVE DUE PROCESS RIGHT ENDORSED IN THE RULING BELOW GOES FAR BEYOND THE COURT'S PRECEDENTS.

Petitioners have discussed how the right-of-access claim fashioned in this case goes far beyond the Court's precedents. *See* Pet. 15-18. Significantly, respondent does not deny the aggressive scope of this right, but counters that it flows naturally from cases such as *Bounds v. Smith*, 430 U.S. 817 (1977), and "has been recognized by this Court throughout a century of jurisprudence." Opp. 13.

With all due respect, the "*substantive* [due process] right" championed by respondent and accepted by the court below, Opp. 13 (emphasis in original), has nothing in common with this Court's precedents. Those decisions fall into two narrow categories: they involve *either* institutional mechanisms directly barring access to the courts, *see, e.g.*, *Chambers v. Baltimore & O.R.R.*, 207 U.S. 142, 147-50 (1907); *Boddie v. Connecticut*,

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[1] Respondent claims that review is "premature" since this case arises on a motion to dismiss, Opp. 25, but fails to recognize this as the standard posture for many of the Court's qualified immunity cases because an "entitlement not to stand trial or face the other burdens of litigation" is at stake. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Behrens v. Pelletier*, 516 U.S. 299, 305-11 (1996). Moreover, the courts "must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

401 U.S. 371, 374-83 (1977), *or* arbitrary restrictions on judicial access for prisoners held in government custody, *see, e.g.*, *Bounds*, 430 U.S. at 821-33; *Johnson v. Avery*, 393 U.S. 483, 485-90 (1969). But there is no institutional bar to suit in this case, and the prisoner cases are distinct because in the "substantive due process analysis, it is the State's affirmative act of restraining the individual's right to act on his own behalf – through incarceration, institutionalization, or other similar restraint of personal liberty – which is the 'deprivation of liberty' triggering the protections of the Due Process Clause." *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). No such denial of liberty has occurred here, and therefore cases such as *Bounds* are entirely inapposite: "In the world of litigation outside prison walls, ... ordinary individuals do not find any physical barriers between them and the courts." *Crowder v. Sinyard*, 884 F.2d 804, 811-12 (5th Cir. 1989), *cert. denied*, 496 U.S. 924 (1990).

Nonetheless, the court below squarely held that government officials violate the right of access to the courts when they hinder private citizens from filing even hypothetical lawsuits by misrepresenting information, and at least *one* of their purposes was to forestall a lawsuit. *See* Pet. App. 28a, 23a. This ruling reaches out to constitutionalize issues adequately addressed by other means, and it cannot be reconciled with the Court's recent precedents that curtail the scope of this right. *See, e.g., Lewis v. Casey*, 518 U.S. 343 (1996); *Thornburgh v. Abbott*, 490 U.S. 401, 409-12 (1989). Respondent can suggest various factual distinctions, but the important core holding in this case is utterly out of harmony with these decisions. *See Lewis*, 518 U.S. at 354-55; *id.* at 365 (Thomas, J., concurring) (expressing doubts about *Bounds* and "a loosely defined 'right of access to the courts'"). The ruling below is also at odds more generally with the Court's explicit reluctance to expand substantive due process rights. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process, because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); *Troxel v. Granville*, 530 U.S. 57, 76 (2000) (Souter, J., concurring) (cautioning against "turning any fresh furrows in the treacherous field of substantive due process") (quotation omitted).

Respondent's attempt to distance this case from the Court's procedural due process decisions, *see* Opp. 13-14, only serves to highlight the defective analysis of lower courts that find constitutional violations even though plaintiffs cannot establish that they have been deprived "of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Indeed, respondent never denies that the very permissive formulation of the right-of-access claim embraced by the court below, which discards any meaningful "exhaustion" requirement in any case involving a claim of injunctive relief, would displace an array of existing state judicial remedies and processes, in clear disregard of this Court's consistent warnings. *See, e.g., Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981); *Paul v. Davis*, 424 U.S. 693, 701 (1976). *See also* Pet. 18. And it bears emphasis that the same claim brought by respondent here would arise from deceptive statements made by domestic law enforcement officials in connection with sting operations or undercover investigations where an individual suffered death or imprisonment or some other irreparable harm as a result. *Cf. Illinois v. Perkins*, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception" or "[p]loys to mislead a suspect").

Accordingly, this case merits review because the court below "has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. CT. R. 10(c).[2]

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[2] Respondent also suggests that the Court's decision whether to grant review should be determined by the fact that the Solicitor General declined to file a petition for certiorari in this case. *See* Opp. 22. The suggestion is inappropriate. The Solicitor General is well aware of the legal authority for federal officials to be represented by private counsel in these circumstances. *See* 28 C.F.R. 50.16 (2000). Moreover, the Court has not hesitated to grant petitions filed by federal officials in such cases where the importance of the issues warrants review. *See, e.g., Hanlon v. Berger*, 525 U.S. 981 (1998); *Behrens v. Pelletier*, 514 U.S. 1035 (1995); *Stafford v. Briggs*, 439 U.S. 1113 (1979).

II. THE CIRCUITS ARE SPLIT ON KEY ELEMENTS OF ANY CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS IN THIS CONTEXT.

Respondent endeavors to explain away the circuit split that both courts noted below, *see* Pet. App. 46a & n.2 (citing cases); *id.* at 23a-24a, but its discussion merely confirms the division of authority and its dispositive effect here.

The court of appeals recognized that two other circuits decline to uphold access-to-courts claims unless the plaintiff has first tried to file a lawsuit and was actually hindered in that effort. *See* Pet. App. 23a-24a. Respondent notes that the court paid its grudging respects to this concept, *see id.* at 62a, but does not dispute that it dispensed with that key requirement here. Instead, respondent argues that it was correct to do so where the plaintiff can allege some potential source of irreparable harm to justify a particular form of relief that is no longer available on the same terms.

The court below styled this approach as a "futility" exception, but it misinterpreted the conflicting rulings of the Sixth and Ninth Circuits in one crucial respect. *Both* cases require plaintiff to show that the defendant's actions actually rendered "any" state court remedy ineffective. *See Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997); *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998). The court below, supported by respondent, construed this language to mean that if *some particular* remedy were rendered ineffective, a valid constitutional claim is raised. But the Sixth and Ninth Circuits apply this "exhaustion" requirement much more strictly – even "reprehensible" actions by government officials to cover up evidence in order to ward off a lawsuit, which "substantially prejudice [her] ability to recover in state court," do not amount to a constitutional violation unless she can "show *absolute denial* from state court." *Swekel*, 119 F.3d at 1264 (emphasis added); *see Delew*, 143 F.3d at 1223 (claim can proceed "if in fact the defendants' alleged cover-up actually rendered *all* state court remedies ineffective") (emphasis added). Accordingly, these courts hold that a plaintiff *must* "make some attempt to gain access to the courts" *before* "filing an 'access to courts' claim." *Swekel*, 119 F.3d at 1264; *Delew*, 143 F.3d at 1222-23. Yet the court below held to the contrary.

The Sixth Circuit has pointedly held that "a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact 'effective' and 'meaningful'?" *Swekel*, 119 F.3d at 1264. Rather than require respondent first to file a lawsuit pressing her tort claims – as she is actually doing now in this case under the Federal Tort Claims Act – the court of appeals here was content with legal hypotheticals that expand a merely "facilitative" right to *access* the courts into a broad constitutional right to secure a particular most desirable outcome. The Fifth Circuit has fairly condemned this approach: "The constitutional right of access does not, however, guarantee one the right to have one's case proceed in a particular procedural posture *or the right to a particular form of relief*." *Crowder*, 884 F.2d at 813-14 (emphasis added); *see also Parratt*, 451 U.S. at 543-44 ("Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded [in federal court,] that does not mean that the state remedies are not adequate to satisfy the requirements of due process."). Respondent pins the empty label of "strawman" on this argument, Opp. 17, but never even tries to explain why the ruling below will not apply in *every* case where the plaintiffs could plausibly claim some entitlement to injunctive relief, which necessarily includes allegations of irreparable harm.

Respondent does not dispute that insistence on this key "exhaustion" element is dispositive of the proper outcome in this case. Adopting the approach endorsed by the Sixth and Ninth Circuits, the district court held that respondent's claim must be dismissed because she did not allege that she had ever tried to bring an action and been hindered in doing so. *See* Pet. App. 45a-46a. Rejecting that approach, the court of appeals reversed and reinstated her claim. *See id.* at 23a-26a. Therefore, this case squarely presents the circuit split on this issue.

As the district court explained, the circuit courts also are split on how egregious a government official's conduct must be to trigger a valid access-to-courts claim. Other circuits have required much more than allegations that government officials acted with mixed motives to mislead or conceal information they were under no legal duty to provide. *See* Pet. App. 47a. In contrast, respondent confirms that the court below was willing to uphold a constitutional claim based on the provision of "biased and misleading" information where it is alleged that at least *one* of the express objectives was to prevent a lawsuit, even if covering up nefarious activities is not the principal motivation for the defendant's actions. Opp. 17-19. Obviously this standard is much more lenient than the egregious conduct required by other courts,[3] and it further underscores the extent to which the disturbing scope of this constitutional claim departs from this Court's precedents.

In sum, private citizens and public officials will continue to have their claims resolved inconsistently in different jurisdictions – under very different views of their constitutional rights and duties – unless the Court grants review in this case.

III. THE COURT OF APPEALS MISAPPLIED THIS COURT'S PRECEDENTS AND PLAINLY ERRED BY DENYING QUALIFIED IMMUNITY HERE.

The ruling below also conflicts with the Court's precedents on qualified immunity. Respondent admits that *no controlling authority* in 1993 or 1994 held that petitioners' conduct would

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[3] *See, e.g.*, Pet. App. 47a-48a; *Vasquez v. Hernandez*, 60 F.3d 325, 329 (7th Cir. 1995) (denying right-of-access claim where defendants engaged in "inexcusable" conduct intended solely to cover up wrongdoing, but "the cover-up failed to achieve such ends"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1264-65 (7th Cir. 1984) (upholding access-to-courts claim on "particularly egregious set of facts" where police officers and others fabricated evidence solely to cover up their wrongful conduct); *Delew*, 143 F.3d at 1221-22 (access-to-courts claim can be valid where defendants engaged in wrongful acts with specific intent to cover up details of their prior conduct).

violate any constitutional right of access to the courts. *See* Opp. 19-20. Shortly before, the state of the law in other jurisdictions had been accurately described as "nebulous," *Crowder*, 884 F.2d at 811, and the range of disagreement has only widened since, which compels a finding of qualified immunity.[4] *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985); *Wilson*, 526 U.S. at 618.

Respondent tries, unconvincingly, to justify the appellate court's departures from the district court's proper analysis of the qualified immunity issue. *Compare* Pet. App. 47a-49a *with id.* at 26a-28a, 66a-67a. Surely it is absurd for respondent to contend (*see* Opp. 21) that petitioners can be denied qualified immunity where the validity of respondent's constitutional claim on the facts alleged is not "clearly established" – for whatever reason, whether procedural or substantive. Here the court of appeals diverged from the Sixth and Ninth Circuits, which refuse to recognize a claim for denial of access to the courts unless plaintiff first tries to file a lawsuit and is actually hindered in that effort. *See supra* Section II. The district court noted that the lower courts disagree on the constitutional merits (*see id.* at 46a & n.2), which were also disputed within the *en banc* court below, *see id.* at 70a-71a (Henderson & Sentelle, JJ., dissenting from denial of rehearing *en banc*). That is more than enough to justify qualified immunity here. *See Wilson*, 526 U.S. at 618.

Respondent also makes little headway in arguing that the court of appeals relied solely on decisions predating the events in question to show that the law was "clearly established" in

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[4] Respondent contends that *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1994), cleared up this "nebulous" law in the Fifth Circuit, but the court actually upheld qualified immunity there against an access-to-courts claim and expressed skepticism about dropping the "exhaustion" requirement by framing the right in terms of an ability "to institute suit." *See id.* at 428-31 & n.7. Indeed, a recent district court case construed *Foster* as having "clarified that if Plaintiff is able to file suit, the right is simply not implicated," and explicitly criticized the ruling below in this case as "giving the right of access to courts a broader definition than that recognized in this circuit." *Ellis v. Magee & Devereux*, 2001 WL 167744, at *2 & n.3 (E.D. La. Feb. 15, 2001).

favor of the access-to-courts claim. Only three of the six cases cited, *see* Pet. App. 66a-67a; *id.* at 26a-28a, even predate petitioners' conduct, and these cases alone cannot bear the weight respondent places on them. *See Ryland v. Shapiro*, 708 F.2d 967, 975-76 (5th Cir. 1983) (stating tentatively that interference with access to courts "may" amount to a constitutional deprivation but noting defendants may be entitled to qualified immunity); *Crowder*, 884 F.2d at 811 (finding no constitutional deprivation and stating that "the current contours of the right can best be described as nebulous"); *Barrett v. United States*, 798 F.2d 565, 573 (2d Cir. 1986) (finding constitutional violation where defendants allegedly suborned perjury and obstructed discovery, conduct that itself "was also a crime"). This imprecise trio of rulings does not constitute "a consensus of cases of persuasive authority such that a reasonable officer *could not have believed* that his actions were lawful." Opp. 20 (quoting *Wilson*, 526 U.S. at 617) (emphasis added).

Stripped of the rhetoric, at the time petitioners acted, no controlling decision and indeed no ruling by *any* court *anywhere* had definitively adjudged their actions to be unlawful. Summary reversal is therefore warranted here to ensure that qualified immunity continues to protect "'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam summary reversal) (quoting *Malley v. Briggs*, 475 U.S. 335, 343, 341 (1986)).

IV. THE RULING BELOW IS FAR-REACHING AND HAS SERIOUS CONSEQUENCES FOR FOREIGN POLICY AND INTELLIGENCE EFFORTS.

Respondent fails to dispel concern about the grave practical effects of the ruling below. Whenever government officials are alleged to have misrepresented or concealed information, and their alleged motivation is at least in part to avoid or forestall a lawsuit, a constitutional violation would be stated if the plaintiff generates even a hypothetical claim for a particular form of relief that has been prejudiced somehow. Significantly, this broad vision of the right of access to the courts raises the prospect of

injecting constitutional issues into virtually every sting operation or undercover police investigation that involves intentionally deceptive conduct, which is deeply problematic.

Indeed, a viable constitutional claim can be pleaded in any case where the plaintiff can claim that he or she would have brought some form of action for injunctive relief. Such cases, by definition, involve immediate allegations of irreparable harm, where delay inevitably creates prejudice. Cases involving the death of an individual are only one subset of the universe of such cases, which could be as frequent as the disbelief and distrust that potential plaintiffs generate toward government officials whom they contemplate suing. And respondent cannot simply shrug off the "mixed motive" issue with vague comments about how this ruling is supposedly "narrow," given their concession that it does recognize a substantive due process claim whenever officials are motivated, "*at least in part*, to shield themselves from liability." Opp. 23 (emphasis added). The only illusory constraint here lies in having enough wits to muster the necessary speculation about motives in drawing up a pleading.

Finally, the ruling below was upheld by an *en banc* vote of the court of appeals with jurisdiction over the officials who direct the nation's foreign affairs and intelligence efforts. Respondent asserts, as did the court below, that concerns on this score are misplaced because the Government remains free to plead a "national security" defense. Opp. 24. This assertion is highly unsatisfactory. The "national security" defense, which derives from the "State secrets" privilege, far from being a casual matter is an unusual approach reserved only for a most extraordinary case, in which concerns about the national interest can defeat the accepted judicial functions. *See Totten v. United States*, 92 U.S. 105, 107 (1876) (action involving matters of state secret cannot be maintained and must be dismissed without judicial examination). As Chief Justice Marshall once said of the doctrine, "[w]hat ought to be done under such circumstances presents a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country." *The Trial of Aaron Burr*, 1 ROBERTSON'S REPORTS 186. Thus it does not mitigate the unprecedented nature of respondent's constitutional

due process claim to urge the courts to sanction, and indeed to provoke, more such constitutional crises.

It hardly needs to be said that the events of the last two months place these issues in stark relief. As one recent news account observed: "Special operations, by their nature, are cloaked in secrecy and deception, making it impossible to know whether the officials who discuss them obliquely are being completely candid." David E. Sanger & Steven Lee Myers, *President Says U.S. Is "in Hot Pursuit" of Terror Group*, N.Y. TIMES, Sept. 29, 2001, at A1. This observation is just as true with respect to the covert operations at issue in this case as it is with respect to any such operations currently proceeding in various locations around the globe. It is no answer to the many considerations attending this work to say that officials must rigidly confine themselves solely to an empty "Glomar" response without regard to judgments they must make about how best to address such matters. *See* Opp. 23. These pressing concerns strongly reinforce the need to grant review in this case.

CONCLUSION

For the foregoing reasons and those stated previously, this Court should grant the petition for a writ of *certiorari*, and either summarily reverse or set the case for plenary review.

Respectfully submitted,

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